



# Building Better

Managing Risk to Effectively Minimize Exposure While Maximizing Profit



## About Skufca Law

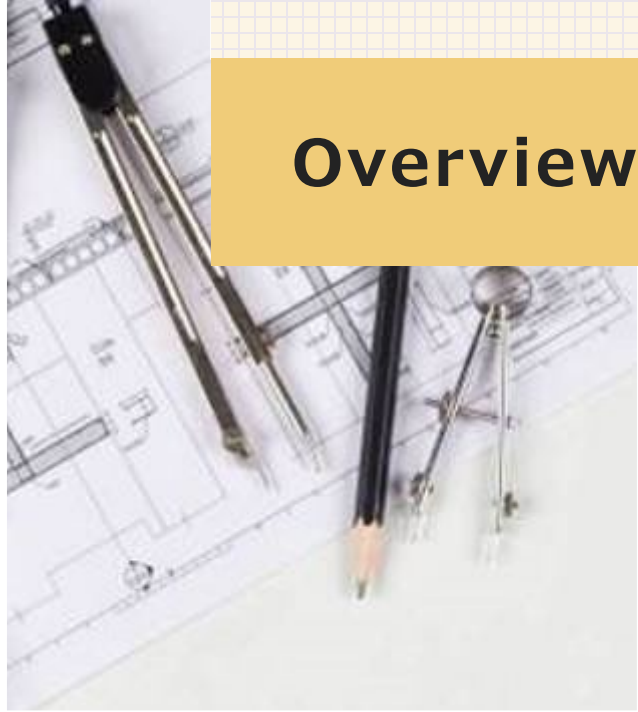
- Full service law firm serving business clients
- We serve as outside general counsel to companies in the construction industry
- We routinely handle transactional and litigated matters
- We serve as trusted advisors



CAROLINAS  
CONSTRUCTION  
ATTORNEYS

[www.skufcalaw.com](http://www.skufcalaw.com)

[www.carolinasconstructionattorneys.com](http://www.carolinasconstructionattorneys.com)



## Overview

**Discussing:**

**Construction contracts and law**

**Importance of written agreements**

**Not intended to take the place of legal counsel.**

**Not legal advice; for general informational purposes only.**



# Contract Disputes

EXAMPLES AND HOW TO AVOID THEM



# Why do the details matter?

## Incomplete or Ambiguous Contracts Increase Risk of:

- Disputes
- Confusion
- Dissatisfaction
- Your Company Bearing More Than Its Fair Share of Costs/Risk/Burdens
- Unpaid Bills

# NARI Standards

## Remodeling Done Right

...starts with the contract.

- All NARI members have agreed to a higher standard of practice
- Following the NARI standards will lower your risk
- Better agreements prevent disagreements.



NATIONAL ASSOCIATION OF  
THE REMODELING INDUSTRY

**Remodeling Done Right.™**

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GREATER CHARLOTTE

# **Unclear Contracts Increase Risks of Longer and Costly Disputes**

**Who would you rather have decide what your contract means, a judge or a panel of 12 jurors with no legal training?**

- **Unclear contracts will be interpreted by a jury**
- **Clear and unambiguous contracts will be interpreted by a judge**
- **A judge can decide the case before trial**
- **Shorter time to decision, less costly and less unpredictable**

# Time to Complete Work – Example of Dispute

Contractor and homeowner agree to the following:

Contractor shall endeavor to cause each subcontract entered into for the performance of the work to require substantial completion of the work thereunder to be completed such that the entire project shall be completed by December 31, 2020.

All construction performed by or on behalf of any party under this Agreement shall be performed in accordance with all applicable laws and shall be performed in as expeditious manner as reasonably possible.

The project is not completed by December 31, 2020.

Will a court find that the Contractor breached this contractual promise for not completing the project by December 31, 2020?

- A. Yes,** the contract says the project must be completed by December 31, 2020 so the Contractor breached that promise.
- B. No,** the contract is ambiguous and a jury must decide whether the Contractor promised a hard deadline to complete the work by December 31, 2020.



# Time to Complete Work – Example of Dispute

## Contract Terms:

Contractor shall endeavor to cause each subcontract entered into for the performance of the work to require substantial completion of the work thereunder to be completed such that the entire project shall be completed by December 31, 2020.

All construction performed by or on behalf of any party under this Agreement shall be performed in accordance with all applicable laws and shall be performed in as expeditious manner as reasonably possible.

## **Answer: B.**

A North Carolina Court found that this provision was ambiguous:

The provision's meaning must be determined by a jury. The terms "shall endeavor" and "shall be completed" as used appear to be inconsistent with one another, the former suggesting that the deadline is aspirational and the latter that the deadline is a firm requirement.

The language of the last sentence suggests that while the parties wished to meet a December 31, 2010 deadline, the construction work under the agreement needed only to be performed in as expeditious a manner as reasonably possible.

# Time to Complete Work – Better Contract Clauses

The better way to handle deadlines is to clearly spell out how they are handled:

SUBSTANTIAL/FINAL COMPLETION Substantial Completion of the Work shall be achieved in \_\_\_\_\_ Days from the Date of Commencement. Contractor shall achieve Final Completion within \_\_\_\_\_ Days after the date of Substantial Completion. The deadlines for Substantial and Final Completion are subject to adjustments as provided for in the Contract Documents.

\*\*The terms “Substantial Completion” and “Final Completion” should be defined elsewhere in the contract. Usually you should tie the final payment owed to the “Substantial Completion” date and allow the client to withhold payment of a nominal sum upon your finishing “Final Completion” of the punchlist.

Then choose between whether you are promising the client a **firm deadline** or an **estimated deadline**:

A firm deadline will state:

**“Time is of the essence** with regard to the obligations of the Contract Documents.”

# Time to Complete Work – Better Contract Clauses

If the deadline is not firm, then state so:

“Time is **not** of the essence with regard to the obligations to achieve Substantial Completion and Final Completion, as stated in Paragraph \_\_\_\_\_. Time is of the essence with regard to all other obligations of the Contract Documents. This dates specified in Paragraph \_\_\_\_\_ are an **ESTIMATE only** since completion of the Work is subject to delays caused by conditions beyond the control of Contractor. If Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of Client, or agent of Client, or of Client’s separate contractor (if any); (2) by changes ordered in the Work; (3) by labor disputes, fire, governmental direction/orders, Acts of God, epidemics, unusual delay in deliveries, unavoidable casualties, adverse weather conditions, or other causes beyond Contractor’s control; (4) by delay authorized by Client pending mediation and binding arbitration; (5) the unavailability of required materials, labor and services from subcontractors; (6) interference by, or disputes with, Client and or Client’s agents or subcontractors employed directly by Client for which Contractor is permitted to suspend construction until such disputes are resolved; (7) failure of Client to promptly make a payment or to timely make decisions or selections of allowances, colors, or materials; or (8) by other causes that justify delay, then the above estimated Date of Substantial Completion will be delayed and Contractor does not guarantee completion of the Work the above date. For the foregoing reasons, **Contractor cannot guarantee nor warrant completion of the Work to Client by the above dates** and is providing these dates as an estimate only. Client also acknowledges that the causes for delays outlined in this Paragraph can potentially cause Contractor to incur additional costs, including, but not limited to, extended general conditions and additional site management fees as part of the typical construction process, and that Client shall be responsible for any additional Cost of the Work incurred by Contractor as a result of said delays.

## **NARI Standard - Itemization:**

**The contract shall itemize the products and services purchased, and describe the types of material and products used.**

Your itemization/description clarifies your scope of work

- Helps to resolve any dispute about what you were hired to do
- Helps to resolve any dispute over the quality/grade of fixtures/products
- Helps the change order process and increase your Contract price
- Helps to establish your right to receive a draw after work is completed

## **NARI Standard – Signing the Contract:**

**The contract shall be completed before the customer signs.**

Following this standard forces the parties to make the hard decisions up front, before there's any possible dispute:

- Defining what the Customer wants
- Defining your scope of work
- Defining who bears what risks
- Defining how to resolve disputes
- Incomplete contracts create risks

## Signing the Contract: Who needs to sign?

### What happens if you don't have all owners of the home sign your contract?

You have **no lien rights** if you fail to have all of the property owners sign your contract.

You **must** have the owners of the property sign your contract.

### What should you do if you are not sure who owns the property?

Look up the deed or call someone who knows how to look up the deed.

What is the lien deadline in North Carolina to file your lien by? (**120 days** of the lien claimant's last date of furnishing labor, materials or services.)

What is the deadline in North Carolina for you to file your lawsuit to enforce your lien by? (**180 days** of a lien claimant's last date of furnishing labor, materials or services.)

# Allowances – Example of Dispute

A home remodeling company has a customer sign its form contract:  
\$122,000 contract price; \$55,000 of allowances

The contract listed some items as “estimates” and some items as “allowances.” Prices were listed next to these items.

“Estimates are provided for budgeting purposes only. More accurate pricing can be provided when design and construction details have been furnished. Allowance figures are included as actual costs to the contractor. Final job expenses will be adjusted accordingly.”

The contract does not define what “actual costs” meant.

Contractor seeks to recover a 15% overhead and profit markup on the costs it incurred related to the items in the allowances category.

There is no additional language in the contract that discusses markup or how to calculate the allowances. The topic of markup was never discussed at the time the homeowners signed the contract.

Homeowners refused to pay. Who wins?

## Allowances – Example of Dispute

On its face, the contract **does not define** what is meant by the phrase "actual costs." Thus, the phrase "actual costs" could be capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.

The inquiry is whether the parties intended to include markup for overhead as "actual costs" under contract. The contractor admits that the overhead markup **was never discussed** at the time of contract formation. In fact, the markup was not discussed at all between the parties until the contractor submitted its final payment request, and that request claimed a fifteen percent markup on the allowance overruns.

The plain and ordinary meaning of the phrase "**actual costs**" in a contract between a contractor and a homeowner **does not necessarily include overhead**. This Court has allowed a contractor to recover overhead expenses against a homeowner when the construction contract unambiguously stated that the contractor was entitled to a percentage mark-up for profit and overhead on all items, however, the contractor's claim for excise tax as an actual cost was not allowed.

Finally, because the language in the this contract is ambiguous, **the ambiguity must be resolved in favor of the non-drafting party**. The contractor drafted the contract in this case and thus the ambiguity will be resolved in favor of Homeowners. In this case, "actual costs" cannot be read to include overhead.

The Homeowners won.



# Allowances – Better Contract Clauses

The better way to handle allowances is to clearly spell out how they are handled:

ALLOWANCES All allowances stated in the Contract Documents shall be included in the Contract Price. While Owner may direct the amounts of, and particular suppliers or subcontractors for, specific allowance items, if Contractor reasonably objects to a supplier or subcontractor, it shall not be required to contract with them. Owner **shall** select allowance items **in a timely manner** so as not to delay the Work. Allowances **shall include** the costs of materials and equipment delivered to the Worksite less applicable trade discounts and **including** requisite **taxes**, unloading and handling at the Worksite, and **labor** and installation, unless specifically stated otherwise. **Contractor's overhead and profit for the allowances shall be included in the Contract Price, but not in the allowances.** The Contract Price shall be adjusted by Change Order to reflect the actual costs when they are greater than or less than the allowances.

\*If you are charging overhead and profit in your allowances then you need to clearly state so:

Contractor shall recover a 15% charge for overhead and profit in the Allowances (the "Markup Fee"). The term "actual costs" includes the Markup Fee.

## **Problem: A customer posts a negative review online**

What if you included one or more of the following clauses in your contract?

1. CUSTOMER and COMPANY agree that this contract is a private and confidential matter and that the terms and conditions of the contract shall not be made public, or given to anyone else to make public, INCLUDING THE BETTER BUSINESS BUREAU. Should the CUSTOMER breach this confidentiality clause, the CUSTOMER agrees to pay COMPANY liquidated damages. THE COMPANY MAY ALSO BE AWARDED ATTORNEY FEES AND COSTS AS REQUESTED BY COMPANY.
2. By signing this contract you are agreeing, under penalty of civil suit not to publicly disparage or defame the Company in any way or through any medium.
3. CONFIDENTIALITY/NON DISPARAGEMENT – I agree not to call the licensing board any governmental agency or individuals if there is a discrepancy as to how the work is performed. You will be charged a minimum of \$5,000.00 in damages if you report anything or contact with any persons or agency or by having another individual(s) do it on your behalf. I agree to our non-disparagement and protection of reputation clause. For the purposes of this Section, 'disparage' shall mean any negative statement, whether written or oral including social media about our Company, employees, Owners, Representatives, etc.

**What risk would your company face if you included one of the above clauses in your contract?**

# Federal Law Prohibits Restrictions on Customer Reviews

The Federal Trade Commission has sued companies that violate the Consumer Review Fairness Act, which was passed in 2016 (the “Act”).

An electrical and HVAC company, which had been in business over 35 years, was sued for violating this law, and now the first page internet search results show that the company was sued by the FTC right after its website shows up:



Waldron Electric  
<https://waldronelectric.com>

## Electricians in Pittsburgh, PA : Waldron Electric, Heating ...

**Waldron Electric**, Heating & Cooling has been serving Pittsburgh and the greater Pittsburgh region with quality service for over 35 years. Electric. Heating.

[Residential](#) · [Commercial](#) · [Heating](#) · [Cooling](#)

## Waldron Electric Heating Cooling Same Day Services

Website

Save

3.7 ★★★★★ 224 Google reviews



Federal Trade Commission (.gov)  
<https://www.ftc.gov/files/documents/cases> PDF

## Waldron Complaint

Waldron. Electric provides electrical, heating, and cooling services. 2. Respondent Thomas J. Waldron is an owner and manager of **Waldron Electric**. Individually ...

# What can you do?

The Act voids any provision in a form contract (like a website's terms of use) that:

1. restricts a party's ability to leave reviews,
2. imposes a penalty or fee for leaving negative reviews, or
3. requires consumers to give up their intellectual property rights in the content of their reviews.

The Act also protects social media posts and uploaded photos or videos, as well as consumer evaluations of a company's customer service, and applies to reviews not available online.

The Act does not prohibit a party from removing reviews from their own site that contain confidential or private information; are defamatory, obscene, explicit, harassing, or discriminatory; are clearly false or misleading; or are unrelated to the goods or services offered by the business.



# Dispute Resolution

WHO ARE WE GOING TO BLAME?

## **NARI Standard – Resolving Disputes:**

**The contract must say how a customer dispute will be resolved.**

Where should a dispute be decided?

How should a dispute be decided?

You could:

- Require that the parties first have a face-to-face meeting to discuss the dispute; if that doesn't work:
- Require that the parties attend a private mediation; if that doesn't work:
- Require that the parties arbitrate the dispute.

# Arbitration vs. Court

Who here has been involved in an Arbitration?

Who here has been involved in a lawsuit in Court?

## Advantages:

- Less Costly
- Less Discovery
- Faster Resolution
- Privacy
- Expert Decision Maker
- Schedule Flexibility
- Finality

## Disadvantages:

- Splitting the Baby
- Less Formal Rules on Evidence
- Finality



# Indemnification

- A party is required to either directly pay or reimburse the financial losses of another party
- Usually will see the phrase “defend, indemnify and hold harmless”
- Cannot include a clause requiring indemnification for the person’s own negligence or intentional acts (N.C. Gen. Stat. § 22B-1)
- These clauses can protect you
- They can also hurt you by requiring you to bear more expense and risk that you were planning on



**“Today we are going to decide who to blame.”**



# Cost Plus, Lump Sum or Hybrid?

What is a cost-plus contract?

- Owner pays the actual cost of the contract plus a flat fee or percentage of the project costs
- Contractor is in a “fiduciary relationship” to the owner: contractor is required to manage and control costs
- Owner may want to have control and continuous input over the scope of the work and labor, equipment and supplies to be used
- Contractor usually has more administrative costs in having to keep track of all receipts and costs and produce documentation to owner every pay application



# Cost Plus, Lump Sum or Hybrid?

What is a lump sum contract?

- Fixed Price
- Contractor bears all of the risk of loss for costs of completion within the scope of work defined in the contract.
- Owner may want to exercise less control and may require less input over the scope of the work and labor, equipment and supplies to be used
- Contractor usually has less administrative costs in having to keep track of all receipts and costs and produce documentation to owner, because the fixed draw schedule doesn't change



# Cost Plus, Lump Sum or Hybrid?

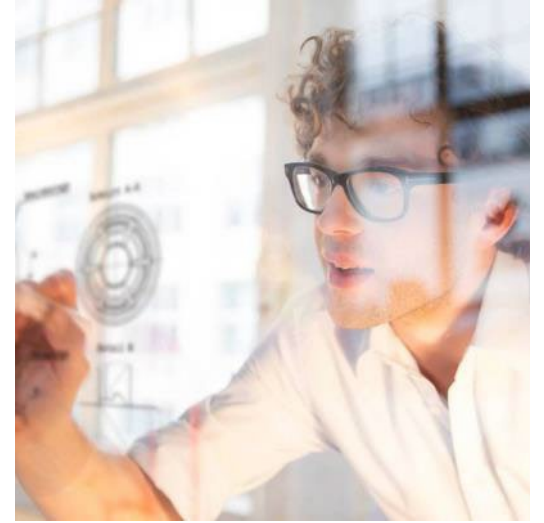
What is a hybrid contract (lump sum with cost plus clauses)?

- A terrible idea.
- People DIY their contracts and end up with a hybrid contract that is neither a lump sum nor a cost-plus contract
- This is the worst of both worlds
- Often ends up in a dispute



# Subcontractor and Supplier Contract Risks

- Better Subcontractor and Supplier Contracts Create Better Deals and Avoid Disputes
- Certificates of Insurance – You need them!
- Scope of Work
- Change Orders
- Partial Lien Waivers
- Final Lien Waiver and Release



# Thank you

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# Questions?

## Experienced Passionate Dependable

Skufca Law is a full-service law firm representing businesses and individuals in North Carolina, South Carolina, and Virginia.

- Business Law
- Construction Law
- Motorsports Law
- Wills & Trusts
- Family Law
- Collaborative Law
- Outside General Counsel



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